

# ATTACHMENT 81

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE: DA VINCI SURGICAL )  
ROBOT ANTITRUST LITIGATION ) Lead Case No.  
 ) 3 : 21 - cv - 03825 - VC  
 )  
THIS DOCUMENT RELATES TO ALL )  
CASES )  
 )  
 )  
 )  
SURGICAL INSTRUMENT SERVICE ) Case No.  
COMPANY, INC., ) 3 : 21 - cv - 03496 - VC  
 )  
 )  
Plaintiff, )  
 )  
 )  
v. )  
 )  
 )  
INTUITIVE SURGICAL, INC., )  
Defendants. )  
 )

REMOTE VIDEO RECORDED DEPOSITION OF  
MICHAEL BURKE, M.D.

Tuesday, September 27, 2022

REPORTED BY: RENEE HARRIS, CSR, CCR, RPR  
JOB NO. 5490765  
PAGES: 1 - 146

1 A. No.

2 Q. Have you ever discussed the lawsuit with  
3 colleagues of yours?

4 A. No.

5 Q. Dr. Burke, when did you first join Valley 09:16:10  
6 Medical?

7 A. August of 1984.

8 Q. And at some point, you became the  
9 chairman of the department of surgery; correct?

10 A. A couple of times, actually, yeah. 09:16:25

11 Q. When did you first become chairman of the  
12 department of surgery at Valley?

13 A. 1988.

14 Q. And if I refer to Valley Medical Center  
15 as "Valley," will you understand what I'm talking 09:16:44  
16 about?

17 A. Yes.

18 Q. That's the hospital where you were  
19 employed for a number of years?

20 A. Correct. 09:16:52

21 Q. So you first became chairman of the  
22 department of surgery at Valley in 1988; how long  
23 did you remain the chairman?

24 A. It was a two-year term, I think. Yeah.

25 Q. And you said you became the chairman of 09:17:14

the department of surgery again at some point; correct?

A. Yes, in I think 2002.

Q. And how long did you remain chairman at that point?

09:17:25

A. Until I retired in January.

Q. And you retired in January of 2022?

A. Correct.

Q. So you were the chairman of the department of surgery at Valley Medical for approximately 20 years?

09:17:44

A. That's correct.

Q. What responsibilities did you have as the director of -- or as the chairman of the department of surgery?

09:18:06

A. Well, it's kind of a -- we have monthly meetings to inform the staff of operations in the hospital, and it was pretty broad from the standpoint of what we covered in those meetings.

We did not involve issues with gynaecology or orthopaedics as they had their own subdivisions.

09:18:27

Q. And who ran the gynecological subdivision?

A. Over what period of time? I mean,

09:18:51

1 Mischaracterizes testimony.

2 THE WITNESS: It depends on the  
3 procedure, I guess. We had a lot of  
4 procedures that they were more complex;  
5 sometimes you had to do them open. Or if you 09:49:51  
6 had a previous surgery where access would be  
7 challenging, then you would do the procedure  
8 open.

9 BY MS. CAHOY:

10 Q. I believe you testified previously that 09:50:24  
11 you were involved in developing the credentials  
12 for robotic privileges; is that correct?

13 A. Correct.

14 Q. Was it a requirement of the hospital that  
15 surgeons with robotic privileges also have 09:50:34  
16 privileges to perform the basic procedure, either  
17 open or laparoscopically?

18 A. Yes.

19 Q. And why did the hospital have that  
20 requirement to -- to your knowledge? 09:50:49

21 A. Well, if the procedure runs into  
22 complications, you have to open the patient and  
23 complete the procedure. So the answer is you have  
24 to be trained on how to handle a potential  
25 complication. 09:51:05

1           Q. Why would a surgeon need to have  
2           credentials to perform the basic procedure  
3           laparoscopically?

4           A. For the same reasons.

5           Q. Are there any other reasons that -- that       09:51:18  
6           you considered it important that surgeons have  
7           privileges to perform the basic procedure, either  
8           open or laparoscopically?

9           A. I think the foundation of any surgical  
10          procedure is the capability to do it open. So       09:51:52  
11          that if you deploy any minimally invasive  
12          protocol, whether it's laparoscopic or robotics,  
13          that your fallback position is that you can do it  
14          open.

15           MS. CAHOY: So I -- let's pull up Tab       09:52:19  
16           20 -- or Tab 55. And I believe we're  
17           starting here with defense Exhibit 49.

18           So if we could -- Paul, if you could  
19           please mark Tab 55 as defense Exhibit 49.

20           (Exhibit 49 was received and marked       09:52:43  
21           for identification on this date and is  
22           attached hereto.)

23           BY MS. CAHOY:

24           Q. And, Dr. Burke, you may need to refresh  
25          your screen as soon as Paul gets this uploaded so       09:52:52

1           A. The ports were a little bit larger, the  
2        -- which required a different instrument through  
3        each of the arms, so we'd have to have stock of  
4        all of that equipment.

5           Q. You said earlier that you were advocating      10:22:08  
6        for the purchase of an Xi; correct?

7           A. Yes.

8           Q. Why did you want the hospital to purchase  
9        an Xi?

10          A. At that time, I thought that the advances     10:22:24  
11        in the technology had improved enough to warrant  
12        another robot, plus we had -- our Si was probably  
13        the oldest one in the State of Washington.

14          Q. And you said the advances in the  
15        technology had improved. What are examples of     10:22:44  
16        ways in which you thought the technology had  
17        improved in the Xi, as compared to the Si?

18           MR. BATEMAN: Objection.

19           Mischaracterizes testimony.

20           THE WITNESS: Well, we had better                   10:23:03  
21        articulating instrumentation. We had vessel  
22        sealers that were an improvement. Eventually  
23        staplers came online, articulating staplers.  
24        Over the course of the process, they were all  
25        more valuable.    10:23:25

1 will not serve anyone's interest. To be clear,  
2 I'm in complete agreement that we need a second Xi  
3 robot to maintain our growth and offer the  
4 services to all that we invest in. There is no  
5 argument that the Xi is more capable, modern and 11:34:40  
6 efficient machine than the Si. Of course we are  
7 open to feedback on how to improve operational  
8 oversight of our growing robotic program, and  
9 several of our points below are valid and we are  
10 actively working on them." 11:35:03

11 Q. So everyone on this e-mail chain thus far  
12 was in complete agreement that the hospital needed  
13 a second Xi robot; correct?

14 A. Yes.

15 Q. And you also agreed with that conclusion? 11:35:15

16 A. Yes.

17 Q. Do you agree with Mr. Wagner that the Xi  
18 is a more capable, modern and efficient machine  
19 than the Si?

20 A. I think the equipment that was utilized 11:35:28  
21 with the Xi afforded more capability to do  
22 operations that were slightly more complex.

23 Q. And what sorts of capabilities did the Xi  
24 offer that the Si did not?

25 A. Well, we had -- in the end, we had 11:35:55

1       automatic staplers. We had vessel-sealing  
2       capabilities. Better articulation. More chances  
3       to move the camera around to different ports. I  
4       mean, a number of areas that, you know -- it  
5       avoided redocking of the robot if you're doing a           11:36:14  
6       more complicated procedure.

7           Q. And it avoided redocking because there  
8       was another arm?

9           A. Another port you could put the camera in  
10      because the port for the camera was the same size          11:36:35  
11      as the operating instruments.

12           Q. And in the last paragraph there,  
13      Mr. Wagner is updating you on funding and timing,  
14      which he describes as the real issue for acquiring  
15      the second Xi robot; correct?                                   11:37:00

16           A. Yes.

17           Q. In the next e-mail, Dr. Bernier responds  
18      so the same thread on August 21st, 2019; correct?

19           A. Which page does that e-mail start on; do  
20      you know?   11:37:35

21           Q. 14376. Looking at the one that says,  
22      "From: Greta Bernier."

23           A. Yes, I have that. Okay.

24           Q. And Dr. Bernier sent that e-mail on  
25      August 21st, 2019; correct?                                   11:37:52

1 payment on -- on purchasing a robot or something  
2 along those lines, but I'm not -- I don't know the  
3 specifics of it.

4 Q. But there were negotiations going on with  
5 Intuitive about -- some back-and-forth  
6 negotiations about how to finance the purchase? 11:54:56

7 A. Yes.

8 Q. And then the next sentence says, "We can  
9 do a Peer Review meeting but it seems to be going  
10 OK." 11:55:10

11 What does that mean?

12 A. That's a totally different topic,  
13 actually. Peer review is more about complications  
14 in surgery, and it would encompass any of the  
15 divisions of surgery. 11:55:20

16 Q. So why were you writing about peer review  
17 in this e-mail?

18 A. I don't know. It probably was bugging me  
19 on that topic at the time.

20 Q. And when you said, "...but it seems to be  
21 going OK," did you mean that you weren't seeing  
22 increased complications with the robot as compared  
23 to other modalities? 11:55:36

24 A. I don't think it was related to the  
25 robot, to be honest with you. 11:55:51

1 page.

2 A. Okay.

3 Q. So on that very first page, the one  
4 marked -- that has page 15993 at the bottom, do  
5 you recognize this document?

12:01:20

6 A. No.

7 Q. At the top of the document it says, it's  
8 from January Wagner to Michael Burke; correct?

9 A. Correct.

10 Q. And that's your name and e-mail address  
11 in the to-line?

12:01:34

12 A. Yes.

13 Q. And on the date, it says it was sent on  
14 August 23rd, 2018.

15 A. Yes.

12:01:45

16 Q. Do you have any reason to believe that  
17 you didn't receive this e-mail --

18 A. I'm sure -- I'm sure I did receive this.

19 Q. And John Wagner writes to you, "We should  
20 know soon. There is still significant cost  
21 savings on the table. I am pushing to get this  
22 done. Hang in there..."

12:02:04

23 Do you see that?

24 A. Yes.

25 Q. Was he providing you with an update on

12:02:20

1 the status of the negotiations for the new robot?

2 A. Yes.

3 Q. And he was telling you there was still  
4 significant cost savings on the table and that he  
5 was pushing to get it done; right? 12:02:28

6 A. Correct.

7 Q. What did he mean by that?

8 A. We thought that he could possibly  
9 expedite us getting a new robot. That's all.

10 Q. And there were cost savings to the  
11 hospital with -- on the table if it expedited  
12 purchasing the robot? 12:02:45

13 A. Yes.

14 Q. And that was because Valley Medical was  
15 going to get a larger discount if it purchased the  
16 robot now, at the same time as another hospital? 12:03:00

17 MR. BATEMAN: Objection. Vague.

18 THE WITNESS: Yeah, I don't know -- you  
19 know, I wasn't involved in that.

20 BY MS. CAHOY:

21 Q. But at this time, Mr. Wagner was still  
22 negotiating with Intuitive about the terms of the  
23 purchase of a new Xi?

24 A. I'm not sure he had the -- as much as he  
25 had the discussions, he wasn't the decision-maker 12:03:39

1 on them.

2 Q. But he was the one who had the  
3 discussions with Intuitive negotiating the  
4 purchase?

5 A. I don't know that specifically. 12:03:53

6 Q. But he was providing you with updates on  
7 how those negotiations were going?

8 A. Yes.

9 Q. Did you follow up with him to ask about  
10 the status of -- of the negotiations after this? 12:04:03

11 A. I don't recall the specifics of it if I  
12 did, but I more than likely did.

13 Q. Did Intuitive ultimately provide  
14 discounts to Valley Medical on the purchase of the  
15 new Xi? 12:04:24

16 A. I don't know -- I don't know that.

17 Q. Who is the person who would know that at  
18 Valley Medical?

19 A. Jeannine -- the finance people would  
20 know, Jeannine Grinnell. 12:04:34

21 Q. Jeannine Grinnell you said -- oh,  
22 Grinnell. Grinnell.

23 A. Jeannine Grinnell, yeah.

24 Q. Who at the time was the CFO?

25 A. No. She was the chief financial -- yes, 12:04:46

1 STATE OF CALIFORNIA )

2 ) ( Ss.

3 COUNTY OF LOS ANGELES )

4 I, RENEE HARRIS, do hereby certify that I  
5 am a licensed Certified Shorthand Reporter, duly  
6 qualified and certified as such by the State of  
7 California;

8 That prior to being examined, the witness named  
9 in the foregoing deposition was by me duly sworn  
10 to testify to tell the truth, the whole truth, and  
11 nothing but the truth;

12 That the said deposition was by me recorded  
13 stenographically;

14 And the foregoing pages constitute a full,  
15 true, complete and correct record of the testimony  
16 given by the said witness;

17 That I am a disinterested person, not  
18 being in any way interested in the outcome of said  
19 action, or connected with, nor related to any of  
20 the parties in said action, or to their respective  
21 counsel, in any manner whatsoever.

22 DATED: October 12, 2022

23 

24 Renee Harris, CSR, CCR, RPR

25 CA CSR No. 14168,

NJ CRR No. 30XI00241200; RPR